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IN THE

Supreme Court of the United States

October Term, 1958

No. 838

NORTH AMERICAN VAN LINES, INC.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

CLIFFORD J. HYNNING
1821 Jefferson Place, N.W.
Washington 6, D. C.
Counsel for Petitioner

Of Counsel:
THOMAS R. KINGSLEY
1424 16th Street, N.W.
Washington 6, D. C.

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INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	1
Constitutional Provisions, Statutes and Regulations Involved	3
Statement of the Case	3
Reasons for Granting the Writ	8
1. The Congress did not authorize the Secretary of the Treasury to adopt "an artificial classification" for purposes of the assessment of the highway motor vehicle use tax	13
2. The mandatory use tax schedule of the Treasury Regulations creates an irrebuttable presumption of fact, contrary to the stipulated facts, and in violation of the due process clause	15
3. The mere addition of a statutory definition to a taxing statute does not by itself authorize the Secretary of the Treasury to define "weight" as an artificial or fictional concept	17
4. A Treasury Regulation cannot be justified against a challenge of arbitrariness in its application to petitioner taxpayer on the ground that it may be fair to other taxpayers or to the trucking industry as a whole	18
Conclusion	20
Appendix A	
Constitution of the United States: Article I	22
Amendment V	22
Internal Revenue Code Sec. 4481-82	22
Use Tax Schedule of T.D. 6216	25

Page

Interstate Commerce Commission, Motor Carrier Regulations Relating to Transportation of Household Goods in Interstate or Foreign Commerce 26

Appendix B

Opinion of Court of Claims 27

TABLE OF CASES

Atlas Transportation Co. v. United States, 165 F. Supp. 392 (DC, Pa., Sept. 15, 1958), affd. — F2d —, 58-2 USTC ¶ 15,180 (C.C.A. 3, Feb. 12, 1959) .. 8, 9

Crooks v. Harrelson 282 U. S. 55, 75 L. Ed. 156, 51 S. Ct. 49 (1930) 10

Heiner v. Donnan, 285 U.S. 312, 76 L. Ed. 772, 52 S. Ct. 358 (1932) 10, 16, 17, 21

Hoeper v. Tax Commission, 284 U.S. 206, 52 S. Ct. 120, 76 L. Ed. 248 (1931) 10, 20

Lucas v. Alexander, 279 U.S. 573, 73 L.Ed. 851, 49 S. Ct. 426 (1929) 17

Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 80 L. Ed. 528, 56 S. Ct. 397 400 (1936) 10, 14

Schlesinger et al. v. Wisconsin, 270 U.S. 230, 70 L. Ed. 557, 46 S. Ct. 260 (1926) 10, 16, 17

Shwab v. Doyle, 258 U.S. 529, 66 L.Ed. 747, 42 S. Ct. 391 (1922) 15

Ungar, Inc. v. Commissioner, 244 F. 2d 90 (1957) 21

United States v. Calamaro, 354 U.S. 351, 1 L. Ed. 2d 1394, 77 S. Ct. 1138 (1957) 10, 14

White v. Aronson, 302 U.S. 16, L. Ed. 20, 58 S. Ct. 95 (1937) 10

CONSTITUTION, STATUTES AND REGULATIONS

CONSTITUTION OF THE UNITED STATES

Article I 3

Fifth Amendment 3, 10, 16

Fourteenth Amendment 10, 16

Page

STATUTES

28 U.S.C. 1255 1
28 U.S.C. 1491 3
Internal Revenue Code, §§ 4481-82 ..... 2, 3, 4, 11, 16, 17, 18

REGULATIONS

Interstate Commerce Commission, Motor Carrier Regulations, § 176.1(a) 4
Revenue Ruling 57-499 15
Treasury Regulations, § 41.4482 (b)-(c) (T.D. 6216) 2, 3, 4, 5, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

CONGRESSIONAL HEARINGS AND MISCELLANEOUS MATERIAL

Department of Commerce (Bureau of Public Roads) 5, 8, 19
Interstate Commerce Commission 4
Secretary of the Treasury 2, 5, 9, 10, 13, 14, 15, 16, 17, 18, 20, 21
Sutherland, Statutory Construction 18

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The petitioner, North American Van Lines, Inc., prays that a writ of certiorari issue to the United States Court of Claims.

OPINION BELOW

The opinion of the Court of Claims is reported at 169 F. Supp. 252, printed in Appendix B, infra, pp. 27-42.

JURISDICTION

The judgment of the Court of Claims was entered on January 14, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTIONS PRESENTED

In a suit for refund, petitioner sought recovery of part of the highway motor vehicle use tax on certain motor

vehicles used exclusively by petitioner as a common carrier of household goods on the ground that the assessment and collection of the tax was erroneous and illegal. The case was submitted to the Court of Claims on a stipulation of fact showing discrepancies between the actual gross weights of petitioner's motor vehicles and the taxable gross weights conclusively assigned under the Treasury Regulations. The Court of Claims dismissed the petition on the ground that Congress had authorized an "artificial classification" of motor vehicles and that the taxing statute as so construed presented no serious constitutional question. The questions presented are:

(1) Whether it is within the power of the Secretary of the Treasury (through his authority to define and classify under § 4482 of the Internal Revenue Code) to prescribe an "artificial classification" of motor vehicles?

(2) Whether the conclusive prescription of taxable gross weight under Treasury Regulations solely on the basis of unloaded weight and number of axles and without regard to the actual gross maximum weight of taxpayer's vehicle is an irrebuttable presumption of fact, and, if so, whether such presumption of fact for purposes of tax administration is in violation of due process of law?

(3) Whether an excise tax may be assessed on the basis of factual characteristics (i.e., gross weight) which are concededly not true of petitioner taxpayer but may be true of other unrelated taxpayers?

(4) Whether an excise tax imposed on the use of highway motor vehicles at the rate of $1.50 per 1,000 pounds of taxable gross weight may be lawfully based on generalized "capacities of equipment" instead of being rationally related to the sum of actual unloaded weights of the taxpayer's motor vehicles and semitrailers and the maximum load customarily carried on the semitrailers?

(5) Whether the power of the Secretary of the Treasury to "generalize" for purposes of excise taxation includes the power to tax the use of petitioner's vehicles under a higher classification (tax category "F") than the classification (tax category "E" or "D") applicable to the stipulated range of weights of such vehicles?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves:

(1) Article I of the Constitution of the United States and the Fifth Amendment to said Constitution, printed in Appendix A, *infra*, p. 22.

(2) Sections 4481 and 4482 of the Internal Revenue Code, as amended, printed in Appendix A, *infra*, pp. 22-24.

(3) Treasury Regulations, §§ 41.4482 (b)-(c), excerpts printed in Appendix A, *infra*; p. 25.

STATEMENT OF THE CASE

This suit for refund of part of the excise tax on the use of highway motor vehicles was filed on January 13, 1958, under 28 U.S.C. 4191 and is also based upon Article I of the Constitution of the United States and the Fifth Amendment to the Constitution. The amount of the tax refund claimed is $5,448.00. R. 4-5.

Petitioner is a corporation organized and existing under the laws of the State of Indiana, with its principal place of business at Fort Wayne, Indiana, and was at all relevant times (July through November, 1956) the registered owner and operator of the 289[1] motor vehicles

[1] Petitioner is abandoning its refund claim with respect to the vehicles taxed in category "D", on the ground that such claim is probably de minimis. This reduced the total number of vehicles here involved from 332 to 289.

involved in this suit. The motor vehicles are truck-tractors used in combinations with semitrailer vans for the exclusive purpose of transporting household goods and, to a very limited extent, new furniture as a common carrier under the authority of the Interstate Commerce Commission. Under such authority petitioner is not permitted to use any of its motor vehicles except for transportation classified as new furniture and "household goods," as defined by the Interstate Commerce Commission in § 176.1(a) of its Motor Carrier Regulations (Appendix A, p. 26). App. B, infra, p. 34.

The highway motor vehicle use tax is imposed under § 4481(a) of the Internal Revenue Code of 1954, as amended by Public Law 627, June, 1956 (Appendix A, pp. 22-24), on the use of a highway motor vehicle "at the rate of $1.50 a year for each 1,000 pounds of taxable gross weight or a fraction thereof." Under § 4482(b) of the Code "taxable gross weight" is defined as the sum of three statutory components, as follows:

> "(1) the actual unloaded weight of—
>
> > "(A) such highway motor vehicle fully equipped for service, and
> >
> > "(B) the semitrailers . . . (fully equipped for service) customarily used in connection with highway motor vehicles of the same type as such highway motor vehicle, and
>
> "(2) the weight of the maximum load customarily carried . . . on the semitrailers referred to in paragraph (1)(B)."

Under the authority to prescribe regulations, the Secretary of the Treasury issued T. D. 6216 (Treasury Regulations § 41.4482 (b)-(c) which prescribed a mandatory use tax schedule (Appendix A, p. 25), for motor vehicles classified into three broad categories—single units, combinations, and buses. This case is concerned only with the middle classification of "combinations" and the second and third subclasses thereunder, namely—

"(E) 2 axled truck-tractor with actual unloaded weight of at least 7,000 and less than 9,500 pounds . . .

"(F) 2 axled truck tractor with actual unloaded weight of 9,500 pounds or more . . ."

Any vehicle falling within categories of "E" and "F", the Regulations provide, "shall be considered for purposes of the regulation in this part, to have the taxable gross weight assigned", i.e., 40,000 and 50,000 pounds, respectively. In fixing these gross weight categories the Treasury Department relied upon statistics that were gathered and evaluated by the Bureau of Public Roads of the Department of Commerce, whose technical advice was directly reflected in the Treasury use tax schedule. F. 6 (p. 35).[1a] Moreover, respondent has conceded that:

> "In developing the taxable gross weight figures used in the Regulations, no attempt was made to distinguish between the various types of goods capable of being hauled or types of transportation services being provided by each particular type and weight of power unit or between the densities of load per cubic foot customarily hauled by the many different groups of carriers within the trucking industry." (F. 12, p. 37)

On or about November 18, 1957, petitioner duly filed with the Internal Revenue Service a claim for refund (R. 17)[2] on the ground that the assessment of the motor vehicle use tax under the Treasury Regulations

> "is arbitrary and capricious, results in the imposition of a tax different from the motor vehicle use tax imposed by Congress (IRC §§ 4481-82), and is predicated upon the creation of an irrebuttable presumption of fact, contrary to due process of law."

[1a] Reference to "F" are to the findings of fact by the court below, printed, infra, pp. 34-42.

[2] The claim was disallowed on January 7, 1958. R. 28.

The amount of refund claimed was the difference between the amounts of the tax as illegally and erroneously assessed under T. D. 6216 and the amounts computed

> "at the tax rate of $1.50 per 1,000 lbs. of the sum of [IRC § 4482 (b)]
>
> "(i) the actual unloaded weight of the truck-tractors,
>
> "(ii) the actual unloaded weight of the semitrailers customarily used in connection with such truck-tractors, and
>
> "(iii) the 'maximum load customarily carried' on such semitrailers, as shown by detailed operating records of the taxpayer."

Attached to the refund claim were calculations based upon detailed operating records with respect to a sample of 15[3] motor vehicles. R. 21. It was stipulated and the court below so found (R. 35, F. 4, pp. 34-35) that this sample was a random sample, that the figures shown by this sample are approximately correct and may be treated as undisputed and are representative of the other motor vehicles involved herein. From the agreed data (p. 41) petitioner has mathematically derived certain computations as follows:

---

[3] By abandoning the claim for motor vehicles taxed in tax category "D", n. 1 supra, the sample was reduced from 19 to 15 vehicles.

SAMPLE DATA ON 15 MOTOR VEHICLES USED BY NORTH AMERICAN VAN LINES, INC.

Operator Number	Van Load (in 1,000 lbs.)		Gross Weight (in 1,000 lbs.)		Van Load (in lbs. Per Cubic Foot)	
	Per Records	Per T.D.	Per Records	Per T.D.	Per Records	Per T.D.
(1)	(2)	(3)	(4)	(5)	(6)	(7)
"E" (average)	9.4	19.8	29.6	40.0	5.0	10.7
318-1	8.9	20.5	28.4	40.0	4.8	11.0
396-1	10.7	19.6	31.0	40.0	5.7	10.6
486	9.6	21.4	28.2	40.0	5.1	11.6
619	9.1	19.0	30.0	40.0	4.9	10.3
717	9.4	19.7	29.7	40.0	5.0	10.6
863	7.9	20.0	27.9	40.0	4.2	10.8
952-1	10.2	18.6	31.6	40.0	5.5	10.0
"F" (average)	9.9	28.2	31.8	50.0	4.7	14.0
633	8.0	30.3	27.7	50.0	5.0	18.9
422	8.9	28.7	30.1	50.0	4.8	15.5
614	7.0	28.6	28.4	50.0	3.7	15.4
790-1	9.0	28.9	30.0	50.0	4.8	15.6
948-2	9.4	26.5	32.9	50.0	5.0	14.3
487	12.8	29.2	33.5	50.0	5.1	11.7
743-1	13.5	26.4	37.1	50.0	5.4	10.5
997-1	11.2	26.7	34.4	50.0	4.4	10.7

Source: Column (2) is taken from column (6) of stipulated Schedule I (p. 41) and columns (3) through (7) are mathematically derived from the data presented in stipulated Schedule I. Column (3) on van load per T.D. 6216 was computed by subtracting the total unloaded weight of the truck-tractor and van combinations from the taxable gross weight under the use tax schedule of T.D. 6215. Column (4) on gross weight per records was computed by adding columns (4) and (6) of Schedule I, differences being due to rounding. The figures in columns (6) and (7) on van load (in lbs. per cubic foot) were computed by dividing the van load in columns (2) and (3) of this table by the van capacity as given in column (5) of stipulated Schedule I.

Since the statutory concept is one of "maximum load *customarily* carried," this table does not present the data of the *maximum* load carried at any one time during the taxable period as presented for comparative purposes in stipulated Schedule I (emphasis supplied).

The above table shows that the average van load (pounds per cubic foot) assumed by the Treasury use tax schedule for tax category "F" was three times (14.0 per cubic foot of van load) the actual loads (4.7 pounds) carried by petitioner taxpayer and more than twice as high in the case of tax category "E" (10.7 pounds contrasted with 5.0 pounds). The loads carried by petitioner were invariably less than 6 pounds per cubic foot. In striking contrast, 91% of all the cargoes included in the weight studies by the Bureau of Public Roads upon whose studies respondent placed its reliance in prescribing the use tax schedule here challenged—had shipping densities in excess of 25 pounds per cubic foot, or more than 4 times the amount of the shipping density of the vehicles of petitioner. F. 20, p. 38.

REASONS FOR GRANTING THE WRIT

Before developing the affirmative reasons for granting the writ, petitioner must candidly acknowledge that there is at least one reason for not granting the writ, namely, there is no conflict among the decisions in the courts below with respect to this particular excise tax regulation. Both the Court of Claims and the Court of Appeals for the Third Circuit have decided against taxpayers in upholding the validity of the Treasury Regulations under the highway motor vehicle use tax. The lack of a conflict between the courts below is the most substantial hurdle that this petitioner must overcome in persuading this Court that a writ should nonetheless issue because of the significance of the issues involved for Federal tax administration in particular and for Executive-Congressional authority in general.

The companion case is *Atlas Transportation Company v. United States*, ——F 2d ——, 58-2 USTC ¶15, 180 (C.C.A. 3, February 12, 1959), in which a petition for certiorari will shortly be filed. *Atlas* involves only "single

unit'' motor vehicles (category "A" of the Treasury use tax schedule), whereas this case is concerned with "combinations", that is, truck-tractors used in combination with semitrailer vans (categories "E" and "F"). *Atlas* also differs in that the taxpayer there claimed a refund of the entire tax on the ground that all of its motor vehicles should be free of the tax by virtue of the statutory exemption of vehicles weighing 26,000 pounds or less. In this proceeding petitioner is claiming that its vehicles were placed in the wrong tax categories under the Treasury use tax schedule but admits that a part of the highway motor vehicle use tax was lawfully assessed and collected with respect to the use of petitioner's motor vehicles.

The Court of Claims has held: (a) although the new excise tax on the use of highway motor vehicles is statutorily imposed at the specific rate of $1.50 per 1,000 pounds or fraction thereof, the Secretary of the Treasury is permitted to make "generalization" for the purpose of determining "taxable gross weight" by very broad categories of motor vehicles (by groupings of 10,000 pounds); (b) that the Treasury use tax schedule is valid because the Congress itself authorized the "artificial classification" of motor vehicles for determining taxable gross weight on the basis of the "load which is artificially loaded in the artificially hitched trailer"; (c) that the validity of the Treasury use tax schedule is unaffected by the invalidity of each of the specific arguments of respondent in support of the Treasury Regulations (i.e., that the Secretary of the Treasury had authority to attribute taxable gross weights to motor vehicles because they were wide or high or long or had only one axle instead of two or more or were numerous on the roads); and (d) that the impracticality of assessing the tax on actual weights, by necessity, required the tax be based on "capacities of equipment" rather than

the weight of the (a) the truck-tractor, plus (b) the semitrailer, plus (c) the maximum customary load.

The result below is a decision in conflict with *United States* v. *Calamaro*, 354 U. S. 351, 359, 1 L. Ed. 2d 1394, 77 S. Ct. 1138 (1957), which held that a Treasury regulation can furnish "no sustenance to the statute" of "something which is not there"; with *Manhattan General Equipment Company* v. *Commissioner*, 297 U. S. 129, 80 L. Ed. 528, 56 S. Ct. 397 (1936), which held that the power of the Secretary of the Treasury to prescribe rules and regulations does not include the power to make tax law and that a tax regulation must be consistent with the statutes and meet the test of reasonableness; with *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 70 L. Ed. 557, 46 S. Ct. 260 (1926) and *Heiner* v. *Donnan*, 285 U. S. 312, 76 L. Ed. 772, 52 S. Ct. 358 (1932), which held that the due process clause of the 14th and 5th Amendments, respectively, were violated by a conclusive presumption of fact, i.e., that a gift made within a specified period prior to the death of the donor shall be considered to have been made in contemplation of death and consequently taxable as part of the donor's estate at the time of death; with *Hoeper* v. *Tax Commission*, 284 U. S. 206, 52 S. Ct. 120, 76 L. Ed. 248 (1931), which held invalid under the due process clause the attempt of a State to assess an income tax against a husband computed on the combined income of himself and his wife; and with *Crooks* v. *Harrelson*, 282 U. S. 55, 75 L. Ed. 156m, 51 S. Ct. 49 (1930, and *White* v. *Aronson*, 302 U. S. 16, 82 L. Ed. 20, 58 S. Ct. 95 (1937), which held that in construing a taxing statute adherence to the letter applies with peculiar strictness, with doubts being resolved favorably to the taxpayer.

The central issue is the statutory and constitutional power of the Secretary of the Treasury, in the guise of rule making under a taxing statute, to assess an excise tax on the basis of what the court below characterized

as "generalization" and "artificial classification." Pp. 31-32. While the taxing statute provides for an excise tax imposed on the use of highway motor vehicles at the specific rate of $1.50 per 1,000 pounds of the sum of (1) the actual unloaded weight of (A) the highway motor vehicle and (B) the semitrailer customarily used in connection with such vehicle and (2) the weight of the maximum load customarily carried on the semitrailer, the result of the Treasury Regulations is a tax determined entirely from the Treasury use tax schedule, which conclusively assigns taxable gross weight on the basis of (1) the number of axles and (2) the unloaded weight of the highway motor vehicle. The Treasury use tax schedule disregards, so far as the computations of the tax for any taxpayer is concerned, the remaining statutory components of taxable gross weight—namely, (1) the actual unloaded weight of the semitrailer and (2) the maximum load customarily carried on the semitrailer. The justification of the court below was that the taxing statute "permitted generalization by the taxing authorities" (p. 31) and authorized "and perhaps required" the resulting "artificial classification" of motor vehicles (p. 32). These novelties of taxing concepts and techniques of tax administration[4] were justified on the ground of necessity because a tax payable once a year "practically . . . had to be based on capacities of equipment"

[4] Normally the Secretary of the Treasury wants taxpayers to keep full records for tax purposes and has recently stressed that the measuring standards (e.g., for accelerated depreciation) must be peculiarly applicable to the particular taxpayer. When estimating procedures are permitted, as in the case of standard deductions under the individual income tax, these short-cuts are only optional—if the taxpayer wants to rely on his records he may claim on the basis of the resulting details. Under the excise tax on the use of motor vehicles the Secretary of the Treasury has flatly refused to follow this general pattern of tax administration, preferring to assess the tax by way of generalization for a host of taxpayers—"the trucking industry as a whole" (F. 13, p. 37)—to whom petitioner bears no tangible or rational relationship.

(p. 33), notwithstanding the statutory language of "weight".

Petitioner and respondents alike agree that the new use tax is based in part on a factual concept—the actual *unloaded* weight of the highway motor vehicle. The method of determining the second and third components of the statutory definition of taxable gross weight—the unloaded weight of the semitrailer and the "maximum weight customarily carried"—lies at the heart of this law suit. In the Treasury use tax schedule these latter statutory components of the tax completely vanish from view or computation, to be replaced by a series of conclusively assigned gross weights. Likewise, the statutory scheme for imposing the tax at the rate of $1.50 per 1,000 pounds or fraction thereof also vanish from the Treasury Regulations, to be replaced by broad categories of tax groupings with a range of approximately 10,000 pounds each.

Petitioner contends that respondent is without statutory authority to prescribe a *mandatory* conversion table for determining taxable gross weights (from the actual unloaded weight of the highway motor vehicle and the number of its axles) that are unrelated to the actual gross weight of petitioner's vehicles. Petitioner further contends that if respondent has the statutory authority, or obligation, as the court below suggested, to prescribe a mandatory table of taxable gross weights, then a constitutional issue is presented, under the only decided cases of this Court, infra, pp. 16-17, as to the power of respondent to create what is essentially an irrebuttable presumption of fact for purposes of the convenience of tax administration—to wit, that a motor vehicle of a given unloaded weight "shall be considered . . . to have a taxable gross weight" as specified in the Treasury use tax schedule without any rational relationship to the actual gross weight of petitioner's vehicles. This constitutional prob-

lem may be avoided by construing the taxing statute adversely to the interpretation by the Secretary of the Treasury.

Our reasons in detail are:

1. **The Congress did not authorize the Secretary of the Treasury to adopt "an artificial classification" for purposes of the assessment of the highway motor vehicle use tax.** Assuming that the Congress has the constitutional power to press a tax classification "to the verge of irrationality," the court below held that the Congress itself had:

> ". . . made the artificial classification. It said that, to determine the tax, you need look only at the type of the tractor. The kind of trailer you, for tax purposes, hitch to it has nothing to do with what this tractor is actually going to haul, but only with what tractors of this type customarily haul. And likewise as to the load which is artificially loaded in the artificially hitched trailer. It is not the actual load which is going to be hauled. It is the maximum load customarily carried in a trailer of the kind which has been artificially hitched to the tractor." Pp. 32-33.

It is submitted that Congress made no "artificial classification" on the face of the statute, nor is there anything in the legislative history,[5] however generously that may be read in favor of the tax collector, which suggests that the Congress intended the Secretary of the Treasury by regulation to prescribe what the court below termed an "artificial classification."

Through the mechanics of the use tax schedule, the Secretary of the Treasury has in effect converted the motor vehicle use tax—which Congress imposed on units of 1,000 pounds of "taxable gross weight" measured by three statutory components, *supra*, p. 4—into a tax de-

[5] The court below cited no legislative history.

termined under the Treasury Regulations exclusively upon the basis of the number of axles and the unloaded weight of motor vehicles grouped into units of 10,000 pounds. A Treasury Regulation can furnish "no sustenance" to the taxing statute of something which is not there. *United States* v. *Calamaro*, 354 U. S. 351, 359, 1 L. Ed. 2d 1394, 77 S. Ct. 1138 (1957)

By so doing in the guise of rule-making, the Secretary of the Treasury has in effect levied a new type of tax from that authorized by Congress. This is the exercise of authority beyond the statutory delegation given to the Secretary of the Treasury by the Congress and beyond the constitutional power of the Congress to delegate to the Secretary of the Treasury. *Manhattan General Equipment* v. *Commissioner*, 297 U. S. 129, 80 L. Ed. 528, 56 S. Ct. 397 (1936).

In concluding that Congress authorized (or required) the Treasury to "look only at the type of tractor,"—ignoring the semitrailer and its load—the court below overlooked the specific wording of the statute that "taxable gross weight" include the sum of the actual unloaded weight of the motor vehicle and its connected semitrailer plus the "maximum load customarily carried . . . *on* the semitrailer" (emphasis added). By so overlooking the little word "on" the court below facilely, if ungenerously, placed the onus of the "artificial classification" upon the Congress. As a matter of fact, it was the statistical bias of the use tax schedule (see table *supra*, p. 7) prescribed by the Secretary of the Treasury that led to the "artificial classification," which is here the subject of complaint.

If the Congress had "the purpose assigned by the Commissioner" of providing for the assessment of the new tax on the use of motor vehicles according to the number of axles and the unloaded weight of motor vehicles, or upon the "capacities of equipment," as the court below

held, Congress "should have declared it." *Shwab* v. *Doyle*, 258 U. S. 529, 536, 66 L. Ed. 747, 42 S. Ct. 391 (1922). Congress did not do so. Nor did any legislative history suggest the tax base be conclusively on unloaded weight and the number of axles, or, as the court below suggested, on "capacities of equipment." Those tax bases appear for the first time in the Treasury Regulations and the opinion of the court below, respectively.

In the court below, respondent endeavored to justify the Regulation on the ground that the statute authorized the Treasury to impose the new use tax on what respondent candidly termed "a composite of weight and size" with some undefined reliance on the "frequency of occurrence of axle loads in the traffic stream." R. 40; F. 23, p. 39. These justifications for the construction of a taxing statute were summarily rejected by the court below on ground that the Secretary of the Treasury lacked authority to attribute fictitious weights to highway motor vehicles upon these grounds, since the tax was statutorily to be measured by weight. P. 32. Yet the court concluded that the tax could be based on "capacities of equipment." P. 33.

2. **The mandatory use tax schedule of the Treasury Regulations creates an irrebuttable presumption of fact, contrary to the stipulated facts, and in violation of the due process clause.**

Under Revenue Ruling 57-499, 1957 IRB 43, the Treasury Department has stated that taxable gross weight for purposes of the highway use tax "must be computed in accordance with the schedule of the taxable gross weight" without regard to the "actual gross maximum weight of a particular vehicle." Thus, petitioner's vehicles were classified in tax category "F" and conclusively assigned a taxable gross weight of 50,000 pounds, notwithstanding the undisputed fact that their actual gross weight range

from 27,000 to 37,000 pounds, which would have logically placed them in the lower tax categories of "D" or "E".

So far as the Treasury Regulations are concerned, it matters not what the actual or true facts with respect to the weights of petitioner's motor vehicles may be. All that matters is the number of axles and unloaded weight from which the taxable gross weight is conclusively derived by merely reading the applicable figure of the mandatory use tax schedule. This is a conclusive or irrebuttable presumption of fact. There is nothing in the statutory language of §§ 4481-82 of the Internal Revenue Code which authorizes the Secretary of the Treasury to establish any such a conclusive presumption of fact, however convenient such a conclusive presumption may be for purposes of tax administration.

Moreover, the legislative or administrative creation of a conclusive presumption of fact for purposes of tax administration has been held unconstitutional. *Schlesinger* v. *Wisconsin*, 270 U. S. 23, 239-40, 70 L. Ed. 557, 46 S. Ct. 260 (1926), which invalidated under the due process clause of the 14th Amendment the provision of a Wisconsin statute which had provided that any gift made within six years prior to the death of the donor should be considered as having been made in contemplation of death and therefore taxable as part of the donor's estate at the time of death. The same result has been reached under the due process clause of the 5th Amendment. *Heiner* v. *Donnan*, 285 U. S. 312, 76 L. Ed. 772, 52, S. Ct. 358, (1932), in which a conclusive two-year presumption of the Federal estate tax law was invalidated.

In both *Schlesinger* and *Heiner* the "crucial" fact (i.e. that a gift had been made in contemplation of death) was presumed by the statute wherever a gift was made within a specified time period (6 and 2 years respectively). Here the "crucial" fact is the taxable gross weight of petitioners motor vehicles and such weight is presumed conclusively under the Treasury use tax sched

ule from the unloaded weight and number of axles of petitioner's vehicles. In neither *Schlesinger* nor *Heiner* was the time of the making of the gift disputed. Nor is here any dispute as to the amount of the unloaded weight and the number of axles of taxpayer's motor vehicles. What was disputed in *Schlesinger* and *Heiner* and what is disputed here is the conclusive inference drawn by the taxing authorities from the undisputed facts. That was the establishment of an irrebuttable presumption of fact.

Since the Congress has said nothing to indicate that it intended to create an irrebuttable presumption of fact, the Secretary of the Treasury has no power under the Internal Revenue Code to create such a presumption by the mere exercise of his power of classification. Since under *Schlesinger* and *Heiner* it would be beyond the constitutional power of the Congress to give the Secretary of the Treasury such a power by statute—and these cases have not been subsequently disapproved—the taxing statute should not be construed as authorizing the Secretary to establish an irrebuttable presumption of fact. *Lucas* v. *Alexander*, 279 U. S. 573, 73 L. Ed. 851, 49 S. Ct. 426 (1929).

3. The mere addition of a statutory definition to a taxing statute does not by itself authorize the Secretary of the Treasury to define "weight" as an artificial or fictional concept.

There is no gainsaying that the term *taxable gross weight* is specifically defined by the taxing statute here involved. It is indeed the basis on which the court below relieved the taxing authorities of what it termed "the probably impossible task of actually weighing the equipment and loads" and permitted "generalization". R. 52. The question then is whether the Secretary of the Treasury is completely free to determine without limitation the meaning of the term *taxable gross weight*, so long

as that term was included among the terms defined in the taxing statute, or must he satisfy a test of reasonableness?

There is nothing on the face of the taxing statute, with its provisions for specific components of taxable gross weights, or the legislative history, to authorize the Secretary of the Treasury to assign taxable gross weights conclusively to taxpayer's motor vehicles without recognizing a reasonable relationship to the actual weights of petitioner's vehicles or to the weights typical of the vehicles used by petitioner taxpayer. Sutherland, *Statutory Construction* (5th Ed.), §§ 4814, 4819. Nor is there anything to indicate any clear and specific intent of Congress that *weight* is a fictitious or non-factual term so far as weight of load is concerned or that the Secretary of the Treasury, in the exercise of his rule-making authority, can fix the weights for taxpayers' motor vehicles that bear no real relationship to the actual weights of the taxpayers' motor vehicles. That is certainly not the plain and ordinary meaning of the term "weight"—which normally raises a question of how many ounces, pounds, or tons? Such a fictitious concept is so unusual that it should not be read into a taxing statute in the absence of clear evidence that Congress had such a design.

4. A Treasury Regulation cannot be justified against a challenge of arbitrariness in its application to petitioner taxpayer on the ground that it may be fair to other taxpayers or to the trucking industry as a whole.

The court below endeavored to justify the taxation of petitioner's motor vehicles under the Treasury Regulations on the ground that the same type of motor vehicle may be used by other taxpayers (who are not engaged in hauling household goods) to carry heavier loads, and that the petitioner was "caught within the generaliza-

tion" and consequently "made to pay taxes upon weights greatly in excess of its actual loads." P. 31. It was stipulated that a truck-tractor with an actual weight of more than 9,000 pounds customarily has "a loaded weight of 50,000 pounds" with a range that would "normally vary from approximately 34,000 pounds to 52,000 pounds." P. 42. But the Treasury use tax schedule selected as the taxable gross weight for category "F" the figure at almost the very top of the stipulated range of weights, 50,000 pounds. This procedure is patently arbitrary by any concept of averaging or statistical "generalization," unless the Bureau of Public Roads was dealing with what statisticians term an extraordinarily "skewed" distribution of instances that constitute the average of a range from 34,000 to 52,000 pounds. There is no evidence of this.

Although the Treasury use tax schedule classifies the type of motor vehicle according to the number of axles and the unloaded weight of the motor unit, the schedule completely ignores the number of axles on the semitrailer van customarily used in connection with the motor unit. Semitrailer vans may be either of the tandem-axle type, where they have two axles in the rear in order to carry heavier loads than would otherwise be permitted by State law, or the single-axle type. All of the semitrailer vans of the taxpayer were of the single-axle type. A simple calculation based on the face of the Treasury use tax schedule for tax category "F" shows that the taxable gross weight of 50,000 pounds could be lawfully carried under State maximum weight laws only by a tandem-axle semitrailer.[6]

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[6] Thus the "F" category assigns a taxable gross weight of 50,000 pounds to a two-axle truck-tractor with an unloaded weight of at least 9,500 pounds for the truck-tractor. Allocating the minimum unloaded weight of the truck-tractor entirely to its front axle leaves a remaining weight of 40,500 pounds. Dividing this weight equally between the rear axle of the semitrailer and

Under our Constitution, however, the tax on any taxpayer is to be determined by the facts relating to that taxpayer alone and cannot be determined on the basis of facts that may apply to *other unrelated* taxpayers. *Hoeper* v. *Tax Commission*, 294 U. S. 206, 52 S. Ct. 120, 122, 76 L. Ed. 248 (1931), where this Court invalidated the attempt by Wisconsin to assess an income tax against a husband computed on the combined total of his and his wife's income.

Petitioner did not contend below (R. 56), nor does it contend in this Court, that an averaging system is per se unlawful. But it does contend that any exercise by the Secretary of the Treasury of his power to classify must result in a classification which bears a reasonable relationship to the actual gross weights of the vehicles used by petitioner taxpayer and others similarly situated in the moving industry. The undisputed facts show that this relationship does not obtain under the Treasury Regulations, supra, pp. 7, 8, 15, 16, 19.

CONCLUSION

The power to tax was sustained by the court below as applied to an "artificial classification" of motor vehicles used by petitioner taxpayer, along with other members of the moving industry, who are "caught within the generalization" derived by the Secretary of the Treasury from the behavior of other and unrelated taxpayers. This is a doctrine that is novel in content and provocative in phrasing, amidst a bland denial that constitu-

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the rear axle of the truck-tractor, the amount of weight per axle would be 20,250 pounds, which is substantially in excess of the State law maximum of 18,000 pounds per axle. The Treasury schedule, therefore, necessarily contemplates in category "F" that tandem axle semitrailers must be used in order to carry the assigned taxable gross weight. Yet the Treasury use tax schedule treats alike all 2-axled motor vehicles having an unloaded weight of 9,500 pounds or more.

tional rights are here involved.[7] The justification is necessity, practicality, convenience—popular grounds for defending the reaches of governmental power. An unrestrained executive power to define and classify for purposes of taxation necessarily imports, as here, the danger of an executive power to tax de facto. This is constitutionally impermissible.

It is for this reason that the issues here presented are important to all taxpayers and not merely to this petitioner. If the executive may defend the expanding scope of tax regulations on grounds of necessity, practicality, and convenience—rather than on what Judge Hand termed "the Word" of the taxing statute[8]—then a new dimension of executive power has been opened up.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

CLIFFORD J. HYNNING
1821 Jefferson Place, N.W.
Washington 6, D. C.
Counsel for Petitioner

Of Counsel:
THOMAS R. KINGSLEY
1424 16th Street, N.W.
Washington 6, D. C.

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[7] The only case authority cited by the court below in its entire opinion was *Heiner* which was listed (p. 33) with the comment that no constitutional issue was seriously presented.

[8] Ungar, Inc. v. Commissioner, 244 F. 2d. 90, 94, (CCA. 2nd. 1957).

APPENDIX A

Constitution of the United States

Article I, Section 8:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

Amendment V.:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Internal Revenue Code, Sec. 4481. (a) Imposition of Tax.—A tax hereby imposed on the use of any highway motor vehicle which (together with the semitrailers and trailers customarily used in connection with highway motor vehicles of the same type as such highway motor vehicle) has a taxable gross weight of more than 26,000 pounds, at the rate of $1.50 a year for each 1,000 pounds of taxable gross weight or fraction thereof.

(b) By Whom Paid.—The tax imposed by this section shall be paid by the person in whose name the highway motor vehicle is, or is required to be, registered under the law of the State in which such vehicle is, or is required to be, registered, or, in case the highway motor

vehicle is owned by the United States, by the agency or instrumentality of the United States operating such vehicle.

(c) Proration of Tax.—If in any year the first use of the highway motor vehicle is after July 31, the tax shall be reckoned proportionately from the first day of the month in which such use occurs to and including the 30th day of June following.

(d) One Payment per Year.—If the tax imposed by this section is paid with respect to any highway motor vehicle for any year, no further tax shall be imposed by this section for such year with respect to such vehicle.

(e) Period Tax in Effect.—The tax imposed by this section shall apply only to use after June 30, 1956, and before July 1, 1972.

Sec. 4482 (a) Highway Motor Vehicle.—For purposes of this subchapter, the term "highway motor vehicle" means any motor vehicle which is a highway vehicle.

(b) Taxable Gross Weight.—For purposes of this subchapter, the term "taxable gross weight", when used with respect to any highway motor vehicle, means the sum of—

(1) the actual unloaded weight of—

(A) such highway motor vehicle fully equipped for service, and

(B) the semitrailers and trailers (fully equipped for service) customarily used in connection with highway motor vehicles of the same type as such highway motor vehicle, and

(2) the weight of the maximum load customarily carried on highway motor vehicles of the same type as such highway motor vehicle and on the semitrailers and trailers referred to in paragraph (1)(B).

Taxable gross weight shall be determined under regulations prescribed by the Secretary or his dele-

gate (which regulations may include formulas or other methods for determining the taxable gross weight of vehicles by classes, specifications, or otherwise).

(c) Other Definitions.—For purposes of this subchapter—

(1) State.—The term "State" means a State, a Territory of the United States, and the District of Columbia.

(2) Year.—The term "year" means the one-year period beginning on July 1.

(3) Use.—The term "use" means use in the United States on the public highways.

USE TAX SCHEDULE OF T. D. 6216

	Taxable gross weight (in pounds)
1. Single Units:	
(A) 2 axled truck equipped for use as a single unit with actual unloaded weight of 13,000 pounds or more	27,000
(B) 3 or 4 axled truck equipped for use as a single unit with actual unloaded weight of at least 13,000 pounds and less than 16,000 pounds	30,000
(C) 3 or 4 axled truck equipped for use as a single unit with actual unloaded weight of 16,000 pounds or more	40,000
2. Combinations:	
(D) 2 axled truck-tractor with actual unloaded weight of at least 5,500 pounds and less than 7,000 pounds	[illegible]000
(E) 2 axled truck-tractor with actual unloaded weight of at least 7,000 pounds and less than 9,500 pounds	40,000
(F) 2 axled truck-tractor with actual unloaded weight of 9,500 pounds or more	50,000
(G) 2 axled truck with actual unloaded weight of at least 9,000 pounds and less than 12,000 pounds and equipped for use in combinations	40,000
(H) 2 axled truck with actual unloaded weight of 12,000 pounds or more and equipped for use in combinations	55,000
(I) 3 or 4 axled truck equipped for use in combinations	60,000
(J) 3 or 4 axled truck-tractor	60,000

3. Buses:

Actual unloaded weight of vehicle plus 150 pounds for each unit of seating capacity provided for passengers and driver.

Any highway motor vehicle which falls in one of the categories shown in such schedule shall be considered, for purposes of the regulations in this part, to have the taxable gross weight assigned to such category. Any highway motor vehicle which does not fall in one of the categories shown in such schedule shall be considered, for purposes of the regulations in this part, to have a taxable gross weight of 26,000 pounds or less.

Motor Carrier Regulations of Interstate Commerce Commission, Relating to Transportation of Household Goods in Interstate or Foreign Commerce, as amended, as shown in CCH Federal Carriers Reporter, para. 1056.

"Sect. 176.3 Determination of weights—(a) *Loaded weight, tare weight, and constructive weight.* (1) Each common carrier by motor vehicle shall determine the tare weight of each vehicle used in the transportation of household goods by having it weighed prior to the transportation of each shipment, without the crew thereon, by a certified weighmaster or on a certified scale, and when so weighed the gasoline tank on such vehicle shall be full and the vehicle shall contain all pads, chains, dollies, hand trucks, and other equipment needed in the transportation of such shipment. After the vehicle has been loaded, it shall be weighed, without the crew thereon, at point of origin of the shipment, and the net weight of the shipment shall be obtained by deducting the tare weight from the loaded weight. Where no adequate scale is available at point of origin, the loaded weight shall be obtained at the nearest certified scale in the direction of the movement of the shipment.

(2) If no adequate scale is available at any point en route or at destination, *a constructive weight based upon 7 pounds per cubic foot of properly loaded van space, may be used.* (Emphasis supplied)

(b) *Part loads.* In the transportation of part loads, this section shall apply in all respects, except that the gross weight of a vehicle containing one or more part loads may be used as the tare weight of such vehicle as to part loads subsequently loaded thereon. A part load for any one shipper not exceeding 1,000 pounds may be weighed on a certified scale prior to being loaded on the vehicle.

(c) *Weight ticket.* Whenever weights are required to be obtained pursuant to this part, the carrier shall cause to be executed a weight ticket, in the form specified below, and such weight ticket shall be maintained by the carrier as part of its record of shipment."

• • • •

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 16-58

(Decided January 14, 1959)

NORTH AMERICAN VAN LINES, INC.

v.

THE UNITED STATES

Mr. Clifford J. Hynning for the plaintiff. *Mr. Thomas R. Kingsley* was on the briefs.

Mr. Jerome S. Hertz, with whom was *Mr. Acting Assistant Attorney General Andrew F. Oehmann*, for the defendant. *Messrs. James P. Garland* and *Lyle M. Turner* were on the brief.

OPINION

MADDEN, *Judge*, delivered the opinion of the court:

This is a suit to recover a part of the highway motor vehicle use tax which the plaintiff was required to pay on its highway tractors and trailers for the taxable period July-November 1956. This excise tax upon the use of motor vehicles on the highways was imposed by sections 4481 and 4482 of the Internal Revenue Code of 1954.

The Federal Aid Highway Act of 1956, 70 Stat. 374, 23 U. S. C. 1952 ed., Supp. IV, § 151ff provided for the early completion of the "National System of Interstate Highways" which had been authorized by earlier legislation. To provide funds for the work, section 206 (a) of the Highway Revenue Act of 1956, 70 Stat. 374, 389, added, among other provisions, sections 4481 and 4482 to the In-

ternal Revenue Code of 1954, 26 U. S. C. 1952 ed. Supp. IV, 4481, 4482. These sections read in part as follows:

SEC. 4481

(a) *Imposition of Tax.*—A tax is hereby imposed on the use of any highway motor vehicle which (together with the semitrailers and trailers customarily used in connection with highway motor vehicles of the same type as such highway motor vehicle) has a taxable gross weight of more than 26,000 pounds, at the rate of $1.50 a year for each 1,000 pounds of taxable gross weight or fraction thereof.

* * * * *

SEC. 4482

(b) *Taxable Gross Weight.*—For purposes of this subchapter, the term "taxable gross weight", when used with respect to any highway motor vehicle, means the sum of—

(1) the actual unloaded weight of—

(A) such highway motor vehicle fully equipped for service, and

(B) the semitrailers and trailers (fully equipped for service) customarily used in connection with highway motor vehicles of the same type as such highway motor vehicle, and

(2) the weight of the maximum load customarily carried on highway motor vehicles of the same type as such highway motor vehicle and on the semitrailers and trailers referred to in paragraph (1)(B).

Taxable gross weight shall be determined under regulations prescribed by the Secretary or his delegate (which regulations may include formulas or other methods for determining the taxable gross weight of vehicles by classes, specifications, or otherwise).

* * * * *

The Treasury Department issued regulations under the authority given it by section 4482. Section 41.4482(b)-1 of Treasury Regulations on Highway Motor Vehicle Use defined "Taxable Gross Weight" for the purposes of this tax. It said that taxable gross weight is the sum of (1) the actual unloaded weight of the truck or tractor; (2) the actual unloaded weight of any one or more trailers or semitrailers customarily used in combination with the type of tractor involved; and (3) the weight of the maximum load customarily carried on such trailers or semitrailers.

The Treasury Regulations then set out a fixed schedule of "taxable gross weights" which would, for tax purposes, be attributed to certain types of equipment. The schedule for "combination" equipment, i. e., tractors hauling trailers, listed seven classes, designated by the letters D to J. The ones with which we are here concerned are classes D, E and F. Class D covered 2-axled truck-tractors with actual unloaded weight between 5,500 pounds and 7,000 pounds. The regulation attributed to such a tractor and its trailer and the load in the trailer a taxable gross weight of 30,000 pounds. Attributed taxable weights of 40,000 pounds and 50,000 were assigned, respectively, to the heavier 2-axled truck-tractors covered by classes E and F.

The plaintiff's objection to the amount of taxes which it was required to pay on its equipment is that the loads which it actually imposed upon the highways were not as heavy as the attributed weights upon which it was taxed.

The plaintiff's business was the hauling of household goods as a common carrier under a license for that purpose from the Interstate Commerce Commission. Household goods are much lighter than the merchandise normally carried in trailers used for general hauling purposes. The household goods carried by the plaintiff weighed less than six pounds per cubic foot of the space

in the trailers in which they were hauled. Of the total tonnage of goods carried in trucks and trailers in 1954, 1,650,825,000 tons, only about 29,000,000 tons were of goods weighing less than 10 pounds per cubic foot.

The plaintiff kept actual records of the weight of the equipment and loads of 19 of its vehicles during the tax period here in question. These records show that the Class D vehicles, to which the taxing authorities attributed a weight of 30,000 pounds, in fact weighed from 25,800 to 29,000 pounds; that the Class E vehicles, to which a weight of 40,000 pounds was attributed, in fact weighed from 28,400 to 31,600 pounds; that the Class F vehicles, to which a weight of 50,000 pounds was attributed, in fact weighed from 27,700 to 37,100 pounds. The parties have stipulated for the purposes of this litigation that these figures are accurate, and are typical of what would be shown by actual records of the experience of all of the approximately 332 trucks in the plaintiff's fleet.

The plaintiff urges that the discrepancy between the actual weight of its equipment and loads and the artificially set weights, on the basis of which the plaintiff's taxes were imposed was so great that it rendered the classification illegal. The parties have stipulated that:

> In developing the taxable gross weight figures used in the Regulations, no attempt was made to distinguish between the various types of goods capable of being hauled or types of transportation services being provided by each particular type and weight of power unit or between the densities of load per cubic foot customarily hauled by the many different groups of carriers within the trucking industry.

Congress in section 4481 imposed a tax at the rate of $1.50 a year for each 1000 pounds of gross weight or fraction thereof. That provision would not seem to authorize the taxing authorities to tax loaded combinations weighing, as did the plaintiff's Class F units, from 27,700 to 37,100 pounds as if they weighed 50,000 pounds. But Con-

gress in section 4482 relieved the taxing authorities of the probably impossible task of actually weighing the equipment and loads by writing a definition of "taxable gross weight" which permitted generalization by the taxing authorities. They could tax as if there were a trailer of the kind "customarily used in connection with" the tractor, and as if it were loaded with "the maximum load customarily carried" on such a trailer by such a tractor. Congress further provided, in the same section 4482 that:

> Taxable Gross weight shall be determined under regulations prescribed by the Secretary or his delegate (which regulations may include formulas or other methods for determining the taxable gross weight of vehicles by classes, specifications, or otherwise).

The parties have stipulated that the figures used by the Treasury Department fairly and accurately represent average maximum loaded weights for the trucking industry as a whole, for tractors of classes D. E. and F. Our question then is whether the generalizations embodied in this classification, which have, perhaps, the effect of taxing accurately, or perhaps undertaxing, a carrier which customarily carries cases of canned fruits or vegetables, for example, is valid as to the plaintiff, which, being caught within the generalization, is made to pay taxes upon weights greatly in excess of its actual loads.

If a statute itself specifies classes, the things at the bottom of the class may be, of course, very different from those at the top of the class, if the class is a large one. The statute is no worse for that, unless there is no rational basis for giving the same legal treatment to things so unlike. When the legislature delegates to the executive the authority to make generalizations or classifications, that authority is not as broad as the power of the legislature itself. Legislative classification need only withstand the test of constitutionality. But classification by the executive, under delegated authority, should be consistent with the intent of the legislature.

There is no reason to suppose that the legislature intended that the executive, as its delegate, should press its classification to the verge of irrationality, which the legislature has the constitutional power to do, but in fact rarely does.

The parties have stipulated that maintenance and construction costs of highways are affected not only by the actual weight of the vehicles, but by the width, height and length of the vehicles, the distribution of gross weight per axle, and the frequency of occurrence of axle loads in the traffic stream. Since Congress measured the tax by weight, we think the Treasury Department had no authority, if it did so, to attribute fictitious weight to vehicles because they were wide or high or long or had only one axle instead of two or more or were numerous on the roads.

We think that the schedule of classes set up in the Treasury Regulations was authorized, and perhaps required, by the statute itself. The discrepancy between actual and artificially attributed weights, of which the plaintiff complains, relates not to the weight of the tractors or the unloaded trailers, but to the weight of the loads carried in the trailers. But section 4482 (b) (2) says that the load element in the "taxable gross weight" shall be:

> The weight of the maximum load customarily carried on * * * the semitrailers and trailers referred to in paragraph (1) (B).

And paragraph (1) (B) describes the trailers as:

> The semitrailers and trailers * * * customarily used in connection with * * * [tractors] of the same type as [the tractor in the combination that is being taxed] * * *.

It was Congress itself which made the artificial classification. It said that, to determine the tax, you need look only at the type of the tractor. The kind of trailer

you, for tax purposes, hitch to it has nothing to do with what this tractor is actually going to haul, but only with what tractors of this type customarily haul. And likewise as to the load which is artificially loaded in the artificially hitched trailer. It is not the actual load which is going to be hauled. It is the maximum load customarily carried in a trailer of the kind which has been artificially hitched to the tractor.

Our question, then, is whether Congress has the power, under the Constitution, to make this kind of a classification for the purpose of imposing an excise tax. We think the case presents no serious Constitutional question. The plaintiff urges that it presents the problem of an attempted legislatively created irrebuttable presumption of a fact which is contrary to the actual fact. It cites *Heiner* v. *Donnan*, 285 U. S. 312, and other cases holding that legislatures do not have that creative power.

In the instant situation Congress recognized, as does the plaintiff, that it would be impracticable to weigh actual loads for the purpose of assessing the tax. It was a tax payable once a year. Practically, it had to be based on capacities of equipment. Congress might have provided that if a taxpayer could prove that it was in the kind of business in which it never used the equipment up to its weight capacity, or that under its Interstate Commerce Commission license it could not lawfully so use its equipment, the tax should be reduced accordingly. Whether such differential treatment of various classes of highway users would have created administrative difficulty and expense disproportionate to the benefits resulting from it was a problem for Congress, not for the courts.

The plaintiff's petition will be dismissed.

It is so ordered.

LARAMORE, *Judge*; WHITAKER, *Judge*, and JONES, *Chief Judge*, concur.

FINDINGS OF FACT

The court makes findings of fact, based upon the stipulation of the parties, and the briefs and argument of counsel, as follows:

1. Plaintiff was the registered owner and operator of the motor vehicles involved in this proceeding at all relevant times.

2. Although plaintiff, to a very limited extent, used the vehicles here in issue to haul some new furniture, said vehicles were otherwise exclusively used by plaintiff in the business of hauling household goods as a common carrier under the authority of the Interstate Commerce Commission. Vehicles which were primarily used to haul new furniture were eliminated from the claims for refund.

3. All of the motor vehicles involved herein fall within categories "D", "E" and "F" of Treasury Regulations on Highway Motor Vehicle Use, § 41.4482 (b)-1. (Internal Revenue Code of 1954)

4. (a) Stipulated Schedule 1, annexed hereto, contains a summary of statistical data gathered by the plaintiff with respect to 19 vehicles selected at random from among the vehicles whose tax status is here in issue.

(b) To the extent that the said statistics may become relevant to the determination of the amount of any refund, in the event of a judgment for the plaintiff, it is agreed that neither party shall be bound by the said statistics, but rather that the amount of any refund shall be determined after a detailed audit by the Internal Revenue Service in connection with a computation under Rule 38 (c) of the Rules of the Court of Claims.

(c) To the extent that they may be relevant to the question of liability as distinguished from the question of the amount of liability, it is agreed that the actual weight figures and cubic foot capacities shown in stipulated Schedule 1 are approximately correct and may be treated as undisputed and as representative of the sta-

tistics for the other vehicles in issue, as listed in Pages 1 through 8a, inclusive, of the Appendix to plaintiff's petition.

(d) The data presented in Exhibit C (p. 15a) of the Appendix to plaintiff's petition with respect to motor vehicles withdrawn from use after July 1, 1956, are approximately correct and may be treated as undisputed insofar as the question of liability as distinguished from the question of the amount of liability is concerned. To the extent that the said statistics may become relevant to the determination of the amount of any refund, in the event of a judgment for the plaintiff, it is agreed that neither party shall be bound by the said statistics, but rather that the amount of any refund shall be determined after a detailed audit by the Internal Revenue Service in connection with a computation under Rule 38 (c) aforesaid.

5. While plaintiff has in its possession the necessary data of record to present the details of actual ladings for all the vehicles involved in the lawsuit in the same manner presented in the sample, the cost of assembling and tabulating the data was such that a sampling technique became necessary from a practical standpoint. The administration of the highway motor vehicle use tax on the basis of records of actual ladings for each vehicle would entail great inconvenience for this taxpayer, for other taxpayers similarly situated, and for the Treasury Department and would entail a cost equal to, or in excess of, revenue collections.

6. The statistics which form the basis of the taxable gross weight schedule contained in Treasury Regulations, § 41.4482 (b)-1, were gathered and evaluated by or under the direction of Mr. Carl Saal, Chief of Traffic Operations Division, Office of Research, Bureau of Public Roads, United States Department of Commerce. The said Mr. Saal has been employed in the Bureau of Public

Roads since 1935 and has performed supervisory functions since 1937.

7. In arriving at the taxable gross weights prescribed in the said Regulations as promulgated by the Treasury Department many factors and many types of evidence were considered, including but not limited to:

(a) Data submitted by various trucking groups.

(b) Bureau of Public Roads loadometer weight studies.

(c) Field data of the Bureau of Public Roads obtained by interviewing carriers.

(d) Manufacturers' specifications, particularly gross vehicle weight ratings, and chassis weights.

(e) State weight limits.

(f) Technical knowledge of officials of the Bureau of Public Roads.

8. After the publication of proposed regulations, public hearings were held by the Treasury Department and thereafter, partly in response to evidence presented at such hearings, the Treasury Department made adjustments in the taxable gross weight schedule.

9. For purposes of the taxable gross weight schedule, all highway motor vehicles are divided into three categories as follows:

(a) Single unit vehicles.

(b) Powered vehicles for use in trailer combinations.

(c) Buses.

10. Within these three categories, the powered vehicles are further classified by the number of axles and by actual unloaded weights. The categories and classes referred to above are standard ones for various statistical purposes and are recognized by the Bureau of Public Roads.

11. The object of the investigations and studies conducted by Mr. Saal or under his supervision was to determine the maximum load customarily carried or hauled by powered vehicles of varying actual unloaded weights in each of the three categories.

12. In developing the taxable gross weight figures used in the Regulations, no attempt was made to distinguish between the various types of goods capable of being hauled or types of transportation services being provided by each particular type and weight of power unit or between the densities of load per cubic foot customarily hauled by the many different groups of carriers within the trucking industry.

13. In promulgating the taxable gross weight schedule contained in the Treasury Regulations, the Treasury Department used averages for the trucking industry as a whole with respect to each of the three categories referred to above, and it is agreed that the figures used by the Treasury Department fairly and accurately represent such averages for the trucking industry as a whole insofar as the parties hereto are concerned. This agreement is based upon industry-wide characteristics of trucking, as would be testified to by an expert of the Bureau of Public Roads, pertinent portions of which are presented in Schedule 2, annexed hereto.

14. In the purchase of a truck, the purchaser normally purchases from the manufacturer a chassis or truck-tractor having a designated wheel base and hauling capacity. The purchase of a semitrailer or trailer is an entirely separate transaction in which the purchaser purchases from a body-builder or trailer manufacturer a trailer or semitrailer having a designated capacity and other special characteristics. As long as the physical hauling capacity of the truck-tractor is not to be exceeded, it is capable of being used with any combination of semitrailer or trailer.

15. Semitrailers vary in length from approximately 16 feet to a maximum of approximately 40 feet, but because of legal overall length limits in the majority of states, the largest semitrailer in standard use in such states is 35 feet in length. Semitrailers also vary in height, length, and weight.

16. Truck-tractors for use in combination with trailers or semitrailers also vary considerably as to weight and size.

17. For the purpose of achieving maximum speed and efficiency of operation, haulers of household goods customarily use a truck-tractor and a semitrailer or trailer of a weight and size that is greater than that used by other truckers in transporting loads of equivalent poundage.

18. The semitrailers used by plaintiff are specially designed for hauling household goods and are commercially unsuitable for hauling general merchandise, which is ordinarily hauled in semitrailers that are designed to withstand rough usage.

19. The shipping densities of general merchandise cargo vary from approximately 6 to 55 pounds per cubic foot. The loads actually carried by each of the 19 vehicles in the sample during the five months here in issue was less than 6 pounds per cubic foot in each instance.

20. For the year 1954, statistics gathered by the Bureau of Public Roads show that in the United States trucking industry as a whole:

(a) approximately 9% of the cargoes carried had shipping densities of less than 25 pounds per cubic foot;

(b) approximately 39% of the cargoes carried had shipping densities of between 25 and 50 pounds per cubic foot;

(c) approximately 17% of the cargoes carried had shipping densities of between 50 and 100 pounds per cubic foot;

(d) approximately 35% of the cargoes carried had shipping densities of more than 100 pounds per cubic foot.

21. The total tonnage carried in trucks in 1954 amounted to approximately 1,650,825,000 tons. Of this total, some 29,000,000 tons were accounted for by cargoes which had shipping densities of less than 10 pounds per cubic foot.

and these cargoes consisted of sixteen types of commodities including household goods. Of the 29,000,000 tons, 929,000 tons consisted of household goods. While the total figures have been the subject of variance since 1954, the percentage distribution of cargo load densities has not varied substantially in the years since 1954.

22. In the transportation of cargoes such as household goods, the truck-tractor used to haul a 28-foot semitrailer can be and frequently is used interchangeably to haul a 32-foot or 35-foot semitrailer.

23. Maintenance and construction costs of highways are affected not only by the actual weight of the vehicles which are to use the highway, but also by factors such as but not limited to:

(a) Width of vehicle,
(b) Height of vehicle,
(c) Length of vehicle,
(d) Distribution of gross weight per axle, and
(e) Frequency of occurrence of axle loads in the traffic stream.

24. The 1957 Handbook of the Society of Automotive Engineers, Inc., lists as "commercial bodies applicable to trucks or trailers" the following:

(a) Platform body
Stake body
(b) Rack body
Stock rack
(c) Express body
Pickup body
(d) Canopy body
(e) Screen side body
(f) Brewery body
(g) Camel back or dray body
(h) Ice body
(i) Lumber body
(j) Pulp wood body
(k) Log body

(l) Glaziers body
(m) Oil field body
(n) Riggers body
(o) Dump body
(p) Garbage and refuse body
(q) Hopper body
(r) Wrecker body
(s) Utilities body
(t) Panel body
    Sedan delivery body
    A Multi-stop body
(u) Van body
    Insulated van body
    Ventilated van body
    Furniture van body
(v) Open top box body
(w) Grain body
(x) Ice cream body
(y) Bottlers body
(z) Automobile transported body
(aa) Armored car body (not military)
(bb) Tank body
    Street flusher or sprinkler body
(cc) Concrete mixer or agitator body
(dd) Bituminous material distributor body
(ee) Horse van body
(ff) Bus body

Schedule 1

AMPLE DATA ON 19 MOTOR VEHICLES USED BY NORTH AMERICAN VAN LINES, INC.

Operator number	Actual unloaded weights			Van capacity (cubic feet)	Weight of van load		
					Per records		Per T. D.
	Tractor	Van	Total		Average	Maximum*	Taxable gross weight
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
364	6740	10660	17400	1800	9000	14400	30000
329	6740	11160	17900	1850	7900	13170	30000
584	6340	11000	17340	1850	8000	12250	30000
918	6940	11610	18550	1850	10400	17071	30000
318-1	8940	10540	19500	1850	8000	14720	40000
306-1	8850	11460	20310	1850	10700	16710	40000
486	7560	10950	18510	1850	9900	14820	40000
619	9000	11920	20920	1850	9100	16315	40000
717	8500	11760	20260	1850	9400	14100	40000
863	8180	11800	19980	1850	7900	12780	40000
952-1	7800	13900	21700	1850	10200	14040	40000
633	9500	10160	19660	1600	8000	13920	50000
422	10040	11180	21220	1850	8800	14402	50000
614	10000	11400	21400	1850	7000	11670	50000
790-1	10460	10580	21040	1850	9000	14888	50000
948-2	11980	11500	23480	1850	9400	16710	50000
487	10280	10460	20740	2400	12800	18350	50000
743-1	10000	13600	23600	2500	13500	18030	50000
997-1	10490	12740	23230	2500	11200	16520	50000

Source: This table (except for column (7), below) is derived from the data presented in the appendices to Plaintiff's Petition. Columns (1), (5), (6), and (8) are taken directly from "Table C" on p. 13a; columns (2), (3), and (4) are taken directly by operator number from Exhibit A, pp. 1a–8a. Column (7) is taken from the records of Plaintiff and shows the maximum load carried at any one time during the taxable period.

*See note in source on column (7).

Schedule 2

In the United States trucking industry as a whole:

(a) a two axle truck-tractor with actual unloaded weight of at least 5,500 pounds and less than 7,000 pounds customarily has, when used in connection with the trailer or semitrailer customarily used with such truck-tractor, a loaded weight of 30,000 pounds.

(b) a two axle truck-tractor with actual unloaded weight of at least 7,000 pounds and less than 9,000 pounds customarily has, when used in connection with the trailer or semitrailer customarily used with such truck-tractor, a loaded weight of 40,000 pounds.

(c) a two axle truck-tractor with actual weight of more than 9,000 pounds, when used in connection with the trailer or semitrailer customarily used with such truck-tractor, customarily has a loaded weight of 50,000 pounds.

(d) the actual fully loaded weights of the type of vehicle described in subparagraph (a) normally vary from approximately 23,000 pounds to 35,000 pounds.

(e) the actual fully loaded weights of the type of vehicle described in subparagraph (b) normally vary from approximately 29,000 pounds to 44,000 pounds.

(f) the actual fully loaded weights of the type of vehicle described in subparagraph (c) normally vary from approximately 34,000 pounds to 52,000 pounds.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover and its petition is dismissed.